

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JORGE LEAL MUNOZ,

Defendant.

Case No. 05-CR-147-TCK

REPORT AND RECOMMENDATION

Defendant's claim of ineffective assistance of counsel based on counsel's failure to file an appeal as raised in the 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence was referred to the undersigned United States Magistrate Judge for an evidentiary hearing. [Dkt. 54, p. 14]. Defendant filed an Evidentiary Hearing Memorandum, [Dkt. 64], and an evidentiary hearing was held on December 13, 2010.

The only issue referred for the undersigned to determine is whether Defendant requested counsel to file a notice of appeal. [Dkt. 54, p. 7]. The undersigned finds that Defendant made no such request of his counsel.

At the sentencing hearing with the assistance of an interpreter of the Spanish language, the Court advised Mr. Munoz, as follows:

THE COURT: You have the right to appeal the Judgment and Sentence of this Court to the Tenth Circuit Court of Appeals.

* * *

If you so request, the clerk of the court will prepare and file a notice of appeal on your behalf. Notice of appeal in writing must be filed within ten days of this date or no appeal is permitted by law.

Mr. Munoz do you understand your rights to an appeal.

THE DEFENDANT: Yes, Your Honor, I understand.

* * *

THE COURT: Anything else on behalf – well let me make sure I had an answer. Did you understand your rights to an appeal?

THE DEFENDANT: Yes, Your Honor.

[Transcript of Proceedings, February 28, 2006; pp. 8-9].

At the evidentiary hearing, Defendant testified that after the sentencing hearing, while still in the courtroom, he told his attorney, Paul Brunton, that he wanted to appeal and Mr. Brunton responded that him he would come to the jail. Defendant further testified that Mr. Brunton did not come to the jail and Defendant did not call or otherwise contact the Federal Public Defender's Office concerning an appeal. Defendant testified he did not realize until some time later that no appeal had been filed.

At the evidentiary hearing Mr. Brunton testified that although he did not specifically remember this sentencing hearing, he was certain Defendant Munoz did not request that he file a notice of appeal and that if Defendant Munoz had asked to appeal, a notice of appeal would have been filed. Mr. Brunton previously signed an affidavit, dated on May 24, 2007, much closer to the sentencing, in which he stated that he "advised Munoz of his right to appeal as did Judge Kern; however, Munoz never requested our office to pursue an appeal." [Government Exhibit 3].

The undersigned finds that Defendant was unmistakably informed by the Court at sentencing that a notice of appeal in writing must be filed within ten days of the sentencing date or no appeal would be permitted. If Defendant had requested Mr. Brunton to appeal and expected him to visit the jail concerning the appeal, Defendant would have made some effort to contact the Federal Public Defender's Office during the ten-day time period

following the sentencing hearing. Defendant admitted he did not make any effort to contact the Federal Public Defender's Office following sentencing. This fact weighs heavily against the credibility of Defendant's testimony at the evidentiary hearing.

Another fact weighing against Defendant Munoz's credibility is that he did not make any statement to the Court at the sentencing indicating that there were issues he wished to pursue. Defendant did not make any statement when specifically given the opportunity by the Court and did not immediately inform the Court that he wanted to appeal. While this lack of action by Defendant would not constitute a waiver of his right to appeal, the lack of action is inconsistent with his testimony that he immediately told Mr. Brunton that he wanted to appeal.

Mr. Brunton's testimony at the evidentiary hearing that Defendant Munoz did not request that he file a notice of appeal was clear, positive, and consistent with Mr. Brunton's earlier affidavit. Moreover, no reason was suggested by the evidence as to why Mr. Brunton would not have filed a notice of appeal for Defendant if he had requested it.

Based on the evidence presented, the undersigned finds that Defendant Munoz did not request Mr. Brunton to file a notice of appeal.

DATED this 22nd day of December, 2010.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE